ASM DEVELOPMENT (KL) SDN BHD v. ECONPILE (M) SDN BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ABU BAKAR JAIS JCA
CHE MOHD RUZIMA GHAZALI JCA
MARIANA YAHYA JCA
[CIVIL APPEAL NOS: W-02(C)(A)-1801-11-2020,
W-02(C)(A)-1802-11-2020 & W-02(C)(A)-443-03-2021]
15 JUNE 2023

Abstract – *While a stay of an adjudication decision is statutorily provided under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'), case law authorities prove that an adjudication decision will not be simply stayed without cogent reasons. The grant of stay must always weigh in the primary object of the CIPAA to ensure a speedy resolution in order that cash flow is not disrupted.*

CONSTRUCTION LAW: *Adjudication decision – Stay – Application for stay pending arbitration – Whether stay automatic once arbitration proceedings initiated – Grounds meriting stay – Whether clear error by adjudicator established – Whether justice of case demands adjudication decision be stayed in any event – Whether there was breach of natural justice – Whether adjudicator acted in excess of jurisdiction – Whether adjudicator's findings of facts could be questioned – Construction Industry Payment and Adjudication Act 2012, ss. 15 & 16*

The appellant appointed the respondent as a contractor for some construction works. However, the works were not completed by the extended completion date. When the negotiations failed, the appellant's architect retrospectively issued a certificate of non-completion entitling the appellant to deduct or recover liquidated and ascertained damages for late completion of the works from the respondent. Since the commencement of the works, the respondent submitted 27 progress payment claims. However, the appellant's superintending officer only issued 15 interim payment certificates and the rest of the progress payment claims were withheld. Consequently, the respondent issued its notice of default pursuant to cl. 26 of the PAM Conditions and thereafter, determined the contract. This was disputed by the appellant. The respondent then, separately, commenced adjudication proceedings against the appellant for its progress payment claims no. 16 to 24 and progress payment claims no. 25 and 26. The adjudication decision favoured the respondent. Since the appellant did not honour the adjudication decision, the respondent instituted an originating summons ('OS') to enforce the adjudication ('OS 1'), whereas, the appellant, dissatisfied with the

adjudication decision, instituted the OS to set aside the adjudication ('OS 2'). The appellant also filed another OS to stay the adjudication decision pending arbitration ('OS 252'). The judge (i) granted OS 1 for the enforcement of the adjudicating decision; (ii) disallowed OS 2 against the appellant; and (iii) refused OS 252 for the stay of the adjudicating decision against the appellant. Hence, this appeal in respect of the decision in OS 252 not to allow the stay of the adjudication decision pending arbitration pursuant to the Construction Industry Payment and Adjudication Act 2012 ('CIPAA').

Held (dismissing appeal)
Per Abu Bakar Jais JCA delivering the judgment of the court:

(1) An adjudication decision could be stayed pursuant to s. 16 of the CIPAA wherein: (i) an application to set aside the adjudication decision under s. 15 has been made; or (ii) the subject matter of the adjudication decision is pending final determination by arbitration or the court. An adjudication decision could be set aside pursuant to s. 15 of the CIPAA if: (i) the adjudication decision was improperly procured through fraud or bribery; (ii) there has been a denial of natural justice; (iii) the adjudicator has not acted independently or impartially; or (iv) the adjudicator has acted in excess of his jurisdiction. An adjudication decision will not simply be stayed without cogent reasons. The fact that the arbitration proceedings had been initiated alone, does not necessarily mean that a stay of the adjudication decision pending arbitration must be granted. In deciding whether a stay of the adjudication decision ought to be granted, the court should consider the intent of the CIPAA *ie*, as a speedy resolution to the dispute of contractors so as to ensure cash flow. (paras 34, 36, 37, 39 & 40)

(2) There were only two grounds that would merit the application for stay of the adjudication decision: (i) there was clear error on the part of the adjudicator in respect of the adjudication decision that was pronounced; and (ii) the justice of the case demands that the adjudication decision be stayed in any event. The two grounds to support the application for stay of the adjudication decision must be strictly applied so as not to defeat the intention of introducing the CIPAA. Further, the merits of the adjudication decision should not be easily challenged. (paras 42, 44 & 45)

(3) The assertion by the appellant that a breach of natural justice had occurred, and the adjudicator acted in excess of jurisdiction, unfortunately remained unproven to warrant a stay of the adjudication decision. There was no evidence that the adjudicator had not heard or chose to ignore relevant issues in the adjudication proceeding. The crux of the matter, which was the allegation on non-payment for the works already done by the respondent for the appellant, was well addressed in the adjudication proceedings. (para 49)

(4) The appellant's dissatisfaction regarding any findings of fact by the adjudicator could not be said to be a breach of natural justice. The appellant's challenge against the adjudicator's findings, that the appellant had prevented the respondent from completing the works contracted to the latter and that the certificate of non-completion had been cancelled, were findings of fact and not opened to the appellant to question the adjudicator. Even if the adjudicator had wrongly answered the right questions or issues including on the adequacy or otherwise of adduction of evidence before him, his decision should still prevail. This would include his findings that the appellant had prevented the respondent from completing the works and that the certificate of non-completion had been cancelled. (paras 49, 51 & 52)

(5) With regard to the dispute on final accounts by both the appellant and respondent, the adjudicator was free and had no bar to hear and determine the dispute on certificates already due for payment. The respondent was in a healthy financial position. Therefore, the court did not agree that the respondent would not be able to pay the appellant in the event the latter was successful in the arbitration. The record showed, among others, the respondent generated revenue of RM728 million. This was another reason why the adjudication decision should not be stayed. (paras 55 & 56)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vission Sdn Bhd & Another Appeal [2016] 1 LNS 1522 CA ***(refd)***

Binastra Ablebuild Sdn Bhd v. JPS Holdings Sdn Bhd & Another Case [2018] 2 CLJ 223 HC ***(refd)***

EA Technique (M) Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd [2020] 1 LNS 1851 HC ***(refd)***

EA Technique (M) Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd [2020] 1 LNS 1264 HC ***(refd)***

Econpile (M) Sdn Bhd v. ASM Development (KL) Sdn Bhd & Other Cases [2020] 1 LNS 940 HC ***(refd)***

Guangxi Dev & Cap Sdn Bhd v. Sycal Bhd & Another Appeal [2019] 1 CLJ 592 CA ***(refd)***

IRDK Venture Sdn Bhd v. Econpile (M) Sdn Bhd & Another Appeal [2020] 1 LNS 1093 CA ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433 FC ***(refd)***

Seal Properties (KL) Sdn Bhd v. Wabina Constructions & Engineering Sdn Bhd [2021] 1 LNS 853 HC ***(refd)***

Sime Darby Energy Solution Sdn Bhd v. RZH Setia Jaya Sdn Bhd [2021] 9 CLJ 880 CA ***(refd)***

Subang Skypark Sdn Bhd v. Arcradius Sdn Bhd [2015] 10 CLJ 801 HC ***(refd)***

Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case [2017] 1 LNS 177 HC ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***

Wong Huat Construction Co v. Ireka Engineering & Construction Sdn Bhd [2018] 1 CLJ 536 HC ***(refd)***

Legislation referred to:
Construction Industry Payment and Adjudication Act 2012, ss. 3, 13, 15, 16, 35

For the appellant - Ng Sim Hong; M/s Edwin Lim & Suren
For the respondent - Lam Wai Loon, Arthur Wang Ming Way, Pan Yan Teng & Lim Ren Wei; M/s Harold & Lam Partnership

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: WA-24C-200-10-2019, WA-24C-253-11-2019 & WA-24C-252-11-2019 (affirmed).]

Reported by S Barathi

JUDGMENT

Abu Bakar Jais JCA:

Introduction

[1] This is an appeal against the decision of the learned judge at the High Court ("HC") who had dismissed the application by the appellant for a stay of the adjudication decision by the adjudicator pending arbitration pursuant to the Construction Industry Payment and Adjudication Act 2012 ("CIPAA").

Backgrounds Facts

[2] The appellant appointed the respondent as a contractor for some construction works. The date of commencement and completion of the works are on 8 October 2016 and 7 January 2018 respectively. The completion date was extended to 7 April 2018. However, the works were not completed by the extended completion date. The parties negotiated but were still not able to achieve an agreement on a further completion date.

[3] As a result, the appellant's architect retrospectively issued a certificate of non-completion dated 7 April 2018 entitling the appellant to deduct or recover liquidated and ascertained damages ("LAD") for late completion of the works from the respondent.

[4] Since the commencement of the works, the respondent submitted 27 progress payment claims. However, the appellant's superintending officer ("SO") only issued 15 interim payment certificates. The certification of the rest of the progress payment claims was withheld.

[5] Consequently, the respondent issued its notice of default dated 25 February 2019 pursuant to cl. 26 of the PAM Conditions and thereafter by letter dated 13 March 2019, the respondent determined the contract. This was disputed by the appellant in its letter dated 21 March 2019.

[6] The respondent then separately commenced adjudication proceedings against the appellant for its progress payment claims no. 16 to 24 and progress payment claims no. 25 and 26. On 17 September 2019, the adjudicator issued her adjudication decision in favour of the respondent.

[7] Since the appellant did not honour the adjudication decision, the respondent instituted the originating summons ("OS" 1) to enforce the adjudication decision on 9 October 2019. On the other hand, the appellant, dissatisfied with the adjudication decision, instituted the originating summons ("OS 2") to set aside the adjudication 27 November 2019. The appellant also files another originating summons ("OS 252") to stay the adjudication decision pending arbitration.

[8] All three OSs were heard before the same learned judge. The parties agreed that if OS 2 is refused, OS 1 would automatically be allowed and *vice versa*. The parties also agreed to defer the hearing of OS 252 until after the disposal of OS 1 and OS 2.

[9] The learned judge finally granted OS 1 for the enforcement of the adjudicating decision and disallowed OS 2 against the appellant for setting aside the adjudication decision. The learned judge then refused OS 252 for the stay of the adjudicating decision against the appellant.

[10] The present appeal before us is only in respect of OS 252, the learned judge's decision not to allow the stay of the adjudication decision pending arbitration applied by the appellant.

At The HC

[11] The learned judge decided that even when the dispute had been referred for arbitration, this would not mean that a stay would automatically be granted.

[12] Based on several reported decisions, the learned judge found that generally there is a high threshold before a stay would be allowed.

[13] There were no clear errors in the adjudication decision that would warrant a stay. This is because there was no evidence of denial of natural justice by the adjudicator, nor the adjudicator had acted in excess of jurisdiction.

[14] Although the merits of the adjudication decision could be revisited, in this case, there were no instances of wrong interpretation of the statute or misreading of case authorities that resulted in the decision being plainly erroneous.

[15] There are no clear errors that would prick the conscience of the learned judge that would justify the stay to be granted.

[16] The learned judge also did not accept that the justice of the case would mean the stay ought to be allowed. The arbitration may be ongoing and where the appellant might have a bigger claim than the respondent but that *ipso facto* does not merit a stay.

[17] The learned judge, having assessed the financial positions of the appellant and respondent is not satisfied that the respondent would not be able to pay the appellant in the event the arbitration is decided for the latter.

[18] The appellant relied on a clause in the contract to withhold payment to the respondent but the learned judge ruled that this clause is contrary to s. 35 of the CIPAA.

Summary Of The Appellant's Submission

[19] Before us, the appellant contended there were clear and unequivocal errors in the adjudicating decision. This is because of the denial of natural justice and excess of jurisdiction by the adjudicator against the appellant.

[20] The appellant has a genuine set-off or counterclaim against the respondent in the arbitration which is much more in monetary value to the amount awarded by the adjudicator for the respondent. The counterclaim arose because of the wrongful termination of the contract by the respondent. This necessitated the appellant to take over the abandoned works of the respondent.

[21] The appellant had obtained a stay of another and separate adjudicating decision ("CIPAA 1") against the respondent where the claim by the respondent against the appellant was much higher than the present adjudication decision ("CIPAA 2). CIPAA 1 is derived from the same facts and disputes as CIPAA 2. CIPAA 1 consists of 90% of the respondent's claim, while CIPAA 2 consists of only 10% of the respondent's claim against the appellant.

[22] Disputes were referred to arbitration before the adjudication decision. The appellant had referred CIPAA 1 and thereafter CIPAA 2 for arbitration. Therefore, the present adjudication decision ought to be stayed pending arbitration as before. The issues in the arbitration include whether the time for completion is at large and whether the appellant has the right to impose liquidated and ascertained damages against the respondent.

Summary Of The Respondent's Submission

[23] The appellant must satisfy the requirements of s. 16 of the CIPAA and show cogent evidence that there are special circumstances to obtain the stay of the adjudication decision.

[24] The court retains the discretion of whether the stay of the adjudication decision should be granted.

[25] A stay of the adjudication decision can be granted but the object of CIPAA for speedy disposal of payment dispute must be considered.

[26] A stay of the adjudication decision ought not to be given readily and caution must be exercised when doing so.

[27] Recently decided cases show that the courts are reluctant to grant a stay of the adjudication decision.

[28] There is no evidence from the appellant that the respondent would not be able to pay the former in the event the arbitration is decided in favour of the appellant.

[29] A pending arbitration alone could not be a determining factor to allow for a stay of the adjudication decision.

[30] The set-off claimed by the appellant was all dismissed by the adjudicator. The adjudicator also had dismissed the rectification costs claimed by the appellant. The adjudicator also correctly found that the certificate of non-completion is invalid and therefore not entitling it to impose liquidated damages against the respondent. The issues had been raised in the adjudication and the appellant wants the same issues to be reheard by the court.

[31] Issues for CIPAA 1 had been decided by the adjudicator and even enforced by the order of the court and affirmed by the Court of Appeal.

[32] When the contract is terminated, the respondent is at liberty to adjudicate the claims that had not been paid.

[33] The records show that the respondent is in a good financial position contrary to the argument of the appellant. The respondent cannot be said to be unable to pay the appellant in the event the latter is successful in the arbitration.

Our Decision

[34] First, the statutory provision that allows the stay of an adjudication decision is s. 16 of the CIPAA. It states as follows:

> (1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:
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> (a) an application to set aside the adjudication decision under section 15 has been made; or
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> (b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.
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> (2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[35] Second, the adjudication decision must be followed unless on the three conditions as statutorily provided by s. 13 of the CIPAA as follows:

> The adjudication decision is binding unless:
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> (a) it is set aside by the High Court on any of the grounds referred to in section 15;

A (b) the subject matter of the decision is settled by a written agreement between the parties; or

(c) the dispute is finally decided by arbitration or the court.

[36] While s. 15 as mentioned above reads:

B An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) the adjudication decision was improperly procured through fraud or bribery;

(b) there has been a denial of natural justice;

C

(c) the adjudicator has not acted independently or impartially; or

(d) the adjudicator has acted in excess of his jurisdiction.

[37] However, case law authorities will prove that an adjudication decision will not simply be stayed without cogent reasons. Mary Lim J (now FCJ) in D *Subang Skypark Sdn Bhd v. Arcradius Sdn Bhd* [2015] 10 CLJ 801; [2015] 11 MLJ 818, said as follows:

[32] *It is my further view that stay should only be granted in exceptional circumstances*; and such circumstances must necessarily refer to the financial status of the other party. The merits of the case before the arbitration or E the court; or even the chances of success in setting aside the adjudication decision are not relevant considerations. *The grant of any stay must always weigh in the primary object of the CIPAA 2012; that it is to ensure a speedy resolution of a payment dispute; that it is to inject much needed cash flow into the contractual arrangements between parties that saw progressive payments of claims as the recognised and accepted way of doing business in construction contracts. It would* F *be futile to encourage parties to resort to adjudication and then deprive a successful claimant of its claim by staying the access to the cash simply because there is another proceeding of the nature described in sub-s. 16(1) which is pending. The whole concept of temporary finality would be lost and the object of the Act defeated if such was the consideration*. (emphasis added)

G **[38]** While Aliza Sulaiman J in the case of *Econpile (M) Sdn Bhd v. ASM Development (KL) Sdn Bhd & Other Cases* [2020] 1 LNS 940; [2020] MLJU 1146 said:

[95] ... whether a stay is to be granted conditionally or unconditionally pursuant to s 16 CIPAA is a matter within the discretion of the Court, H and ASM still bears the burden of showing to the Court that there are special circumstances to justify a stay, and how and why the discretion is to be exercised in its favour, **bearing in mind that a successful claimant in an adjudication should not be deprived of the very benefit of why it resorted to adjudication in the first place**. (emphasis added)

I **[39]** Besides, the fact that the arbitration proceeding had been initiated alone, does not necessarily mean that a stay of the adjudication decision pending arbitration must be granted. This is explained in the Federal Court

case of *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433 where Mohd Zawawi Salleh FCJ in delivering judgment referred to a case decided by Lee Swee Seng J at the HC and said:

> [52] In the case of *PWC Corporation Sdn Bhd v. Ireka Engineering & Construction Sdn Bhd & Other Case (No. 2)* [2018] 1 LNS 163, Lee Swee Seng J in refusing a stay application pursuant to s. 16 of CIPAA 2012, observed the purpose of CIPAA 2012 as follows:
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> > [111] Whilst the Respondent had fulfilled the threshold condition of obtaining a Stay in that a Notice to Arbitrate has been served on the Claimant and that the Arbitration would decide fully and finally all issues that have arisen in the dispute between the parties, that threshold is only a mere trigger for the Court to consider exercising its discretion with respect to Stay. *It is not the "be all and end all" of the consideration for Stay of the Decision for otherwise it would be a carte blanche for all who have an Adjudication Decision against them to effectively get a Stay of the Decision by serving a Notice of Arbitration or to file a Writ against the successful Claimant*. That would be to denude the CIPAA of its designed purpose of facilitating cash flow in the construction industry and promoting prompt payment for work done for which the contractor is already out of pocket. The construction scene is strewn with sob stories of contractors who have fallen down the slippery slope of financial stress simply because payments for work done or services rendered were delayed. (emphasis added)

[40] Further, in deciding whether a stay of the adjudication decision ought to be granted, a court should consider the intent of CIPAA *ie*, as a speedy resolution to the dispute of contractors so as to ensure cash flow. Gunalan Muniandy JCA in delivering judgment in the Court of Appeal case of *Sime Darby Energy Solution Sdn Bhd v. RZH Setia Jaya Sdn Bhd* [2021] 9 CLJ 880 said as follows:

> [55] *Before concluding, we propose to highlight the objectives and legislative intent of CIPAA 2012 which revolve around speedy and efficient dispute resolution in the construction industry to safeguard the public interest*. On this point, we concur with the view expressed by the learned judge in the High Court case of *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Case* [2015] 1 LNS 756 as follows:
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> > Operation and application of CIPAA
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> > 135. Having examined the provisions of CIPAA, appreciated Parliament's intention in respect of CIPAA, understood how other jurisdictions have dealt, with adjudication, the next step is to recognise the Act for what it is; and that it is an Act providing for a "speedy dispute resolution through adjudication." The dispute that needs speedy resolution must necessarily be a dispute over payment claims in construction contracts. The provisions in the Act regulate the whole process of adjudication and for matters

connected and incidental to adjudication. All this serves the object of ensuring and facilitating "regular and timely payment in respect of construction contracts.

[56] Similarly, the Federal Court in discussing the legislative purpose of enacting the CIPAA, remarked emphatically in *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433 that:

[53] When the High Court decided on both the enforcement and setting aside applications, the learned judge made the following observations:

[93] In all this debate we must not forget Parliament's intention in enacting CIPAA is to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters. The objective and purpose for CIPAA are to provide a solution to payment problems that stifle cash flow in the construction industry.

(emphasis added)

[41] In the Court of Appeal case of *IRDK Venture Sdn Bhd v. Econpile (M) Sdn Bhd & Another Appeal* [2020] 1 LNS 1093; [2020] 5 MLRA 515 it is highlighted the intention of the legislature is as follows:

[53] The intention and objective of CIPAA is very clear. **It was specifically enacted to address issues in the construction industry such as to alleviate cash flow problem for the unpaid party and to give a temporary finality to the payment claims.** The Act was designed to assist the parties to be paid speedily for the work which they had carried out and for adjudication proceeding for payment claim that is due and payable before the determination of the contract.

(emphasis added)

[42] It is most important to bear in mind that in respect of the stay of the adjudication decision as requested by the appellant, there are only two grounds that will merit such application. First, there is clear error on the part of the adjudicator in respect of the adjudication decision that was pronounced. Second, the justice of the case demands that the adjudication decision be stayed in any event. The Federal Court ("FC") case of *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22 is the authority on the scope and extent of the same. In this case, it is held as follows:

The correct approach for a stay under s 16 of the Act would be to evaluate each case on its merits without the fetter of a pre-determined test not found in the section itself namely the financial capacity of the contractor to repay. It could be a factor but not the only factor. *Under s 16 of the Act the courts could stay an adjudication decision when there were clear errors, or to meet the justice of the individual case and any attempt to restrict the application of s 16 of the Act in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility.*

(emphasis added)

[43] In this regard, alluding to the apex court decision above and dealing with the challenge on the adjudication decision, Lim Chong Fong J (now JCA) in *EA Technique (M) Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd* [2020] 1 LNS 1851 addressed an application for stay of the adjudication decision, similar to the present application before us and our learned brother said as follows:

> [25] I have recently in *Maju Holdings Sdn Bhd v. Spring Energy Sdn Bhd* [2020] 1 LNS 1194; 2020 MLJU 1162 held as follows in my interpretation of the View Esteem case:
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> > [17] Clear error has not been defined. Obviously, it is fact sensitive depending on the circumstances of each case as to how the adjudicator reasoned his findings in the adjudication decision. *In my view, the error must be so grave that it pricks my conscience if I left it unrectified. In a way, it is subjectively objective.*
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> [26] In amplification, I think that the Federal Court has opened the window but certainly not the flood gates to permit the Court to review the merits of the adjudication decision in rare and exceptional cases of error. It is not possible to define the size of the window because this obviously varies with the facts of each case. *The error must no doubt be very serious and I venture a general example such as when the adjudicator has decided on the merits of the dispute in blatant disregard of a statutory provision or trite case authority of the Federal Court.*
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> [27] *Furthermore in the View Esteem case, it is also stated that the financial status is not the sole factor in determining the grant of the stay. The stay may be allowed to meet the justice of the individual case aside from clear error. They seem to be disjunctive as explained in the Leap Modulation case. Justice of the case is of course even more subjectively objective. It involves the exercise of discretion. However, in light of the caveat of caution mentioned in the View Esteem case, I am also only minded to grant the stay if my conscience is pricked in the special circumstances of the case. Beyond that, it is incapable of definition or illustration.*
>
> [28] *The bottom line is that considerations of both clear error as well as justice of the individual case to justify the stay of an adjudication decision have to be stringently applied as this would otherwise defeat the statutory intent of the CIPAA to ensure cash flow in the construction industry; see Subang Skypark Sdn Bhd v. Arcradius Sdn Bhd [2015] 1 CLJ 801.* (emphasis added)

[44] Thus, it is also relevant to always recognise that the two grounds to support the application for stay of the adjudication decision as explained, must be strictly applied so as not to defeat the intention of introducing the CIPAA.

[45] It is also evident that the merits of the adjudication decision should not be easily challenged. This is seen where Lim Chong Fong J (now JCA) hearing the same parties as above, in *EA Technique (M) Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd* [2020] 1 LNS 1264; [2020] 11 MLJ 353 pointed out the need to respect and appreciate the merits of the adjudication decision as follows:

A [50] It is clear to me that EAT is questioning the merits of the adjudictor's decision here. This is unlike what happened in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* and *Mecomb Malaysia Sdn Bhd v. VST M&E Sdn Bhd* [2018] 8 CLJ 380; [2018] MLJU 265 where the adjudicator was found to have abdicated his duty in not considering the respondent's defence therein because of having mistakenly held that he had no jurisdiction to
B entertain it. It cannot be disputed that the learned adjudicator dealt with the defences of EAT here but he dismissed them. *The decision of the adjudicator is binding by virtue of s. 13 of the CIPAA even if he has wrongly answered the right questions or issues including on the adequacy or otherwise of adduction of evidence before him. If EAT is dissatisfied with it, the recourse is to have it finally determined either by arbitration or litigation in court. This is the peculiar*
C *nature of statutory adjudication.* It is not in dispute that the parties are presently having their disputes resolved in arbitration ('arbitration').

(emphasis added)

[46] This point is further elaborated and hence it is also appropriate and
D relevant to note the Court of Appeal case of *ACFM Engineering & Construction Sdn Bhd v. Esstar Vission Sdn Bhd & Another Appeal* [2016] 1 LNS 1522 in which it is said:

[21] ... **In the context of section 15 of CIPPA 2012, it cannot be the function of the Court to look into or review the merits of the case or**
E **to decide the facts of the case**. The facts are for the adjudicator to assess and decide on.

(emphasis added)

[47] The cases above, demonstrate that it is quite a task for an applicant in his application for a stay of the adjudication decision. Although there can be
F no doubt the stay of an adjudication decision can be allowed, the cases as highlighted above laid down serious requirements for the same to succeed. These conditions can be summarised as follows:

(i) there are only two grounds to support the application of a stay of the adjudication decision;

G (ii) the two grounds as explained, must be stringently complied;

(iii) in respect of the first ground, there must not be just a simple error but clear error on the part of the adjudicator in respect of his adjudication decision;

H (iv) the clear error must be grave to prick the conscience of the court hearing the application to stay the adjudication decision;

(v) the adjudicator's decision must be upheld even if he has wrongly answered the right questions or issues including on the adequacy or otherwise of adduction of evidence before him and;

I (vi) the court is not to look into or review the merits of the case or to decide the facts of the case.

[48] It is most important to be reminded that these requirements are not set out the first time by us in this panel. The same are only clearly derived from the case law authorities as alluded above. Having noted the high burden on the appellant to satisfy the requirements as shown, with respect, we are of the considered opinion the appellant had not met the requirements as found by the case law authorities.

[49] For instance, the assertion by the appellant that a breach of natural justice had occurred and the adjudicator acted in excess of jurisdiction, unfortunately remains unproven to warrant a stay of the adjudication decision. Perusing the records, we could not find the evidence that the adjudicator had not heard or chose to ignore relevant issues in the adjudication proceeding. The crux of the matter is the allegation of non- payment for the works already done by the respondent for the appellant. This is well addressed in the adjudication proceeding and we are not inclined to find the contrary against the adjudicator.

[50] Further, we are of the considered opinion, in any event, for an alleged breach of natural justice, it must not be any breach but a material breach. This is pointed out in the Court of Appeal case of *Guangxi Dev & Cap Sdn Bhd v. Sycal Bhd & Another Appeal* [2019] 1 CLJ 592; [2019] 6 MLRA 710 as follows:

> [32] This brings us to the final issue of whether the breach of natural justice was a material breach. **It is accepted law that any breach of natural justice must not be peripheral but must be a material breach affecting the outcome of the resolution of the dispute** (see *Cantillon Ltd v. Urvasco Ltd* [2008] EWHC 282 (TCC). (emphasis added)

[51] It is also important to note the case of *Seal Properties (KL) Sdn Bhd v. Wabina Constructions & Engineering Sdn Bhd* [2021] 1 LNS 853; [2021] 5 MLRH 278 where it is explained that the dissatisfaction of a party on the findings made by the adjudicator does not amount to a breach of natural justice. Thus, in our present case too, the appellant's dissatisfaction regarding any findings of fact by the adjudicator could not be said to be a breach of natural justice so as to assist the appellant in obtaining an order for a stay of the adjudication decision.

[52] The appellant also challenged the adjudicator, among others, regarding the finding that the appellant had prevented the respondent from completing the works contracted to the latter. Also challenged, is the finding of the adjudicator that the certificate of non-completion had been cancelled. We find that based on the earlier summarisation of requirements, imposed on the appellant to succeed for a stay of the adjudication decision, these are findings of fact, not opened to the appellant to question the adjudicator. As earlier explained, one of the requirements also stipulates that even if the adjudicator has wrongly answered the right questions or issues including on the adequacy

or otherwise of adduction of evidence before him, his decision should still prevail. Therefore, this would include his findings that the appellant had prevented the respondent from completing the works and that the certificate of non-completion had been cancelled.

[53] In view of the above, this court is also aware that Lee Swee Seng J (now JCA) in *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case* [2017] 1 LNS 177; [2017] 7 AMR 887 explained clearly that the finding of fact is the province of the adjudicator. This is explained as follows:

> [123] *All said, findings of facts and findings of mixed facts and law are matters within the sole province of the adjudicator and this court would not be able to interfere in a s 15 of the CIPAA application for breach of natural justice or excess of jurisdiction*. In the context in which the above findings were made, there is nothing that goes to jurisdiction of the adjudicator as in the validity of his appointment. *Even if the adjudicator had come to a wrong finding of fact premised on his wrong understanding of the law, this court would not generally interfere unless that finding of fact and interpretation of the law go to jurisdiction or that the other grounds for setting aside in s 15(a) or (c) of the CIPAA apply*.
>
> (emphasis added)

[54] In *Wong Huat Construction Co v. Ireka Engineering & Construction Sdn Bhd* [2018] 1 CLJ 536 Lee Swee Seng J (now JCA) also emphasised the importance to accept the finding of fact by the adjudicator and this is said as follows:

> [113] It cannot be over-emphasised that it is not for this court to re-hear, re-open or re-evaluate the findings of fact made by the adjudicator... Any invitation to go down that road under the guise of excess of jurisdiction must be resisted.

[55] With regard to the dispute on final accounts by both the appellant and respondent, the adjudicator is free and has no bar to hear and determine the dispute on certificates already due for payment. This is supported by the case of *Binastra Ablebuild Sdn Bhd v. JPS Holdings Sdn Bhd & Another Case* [2018] 2 CLJ 223; [2018] 8 MLJ 190 where Lee Swee Seng J (now JCA) said clearly as follows:

> [63] *Whilst I accept that any disputes on the final accounts may be referred by the employer to arbitration under cl. 26.6 (b) in the case of determination of employment by the contractor under cl. 26 of the contract, that is not to say that the claimant as contractor cannot avail itself of its right to adjudication for certificates already due for payment*.
>
> [64] *To deprive the claimant such a statutory right for a speedy resolution of the dispute would be to visit the claimant with a double whammy; on the one hand it was precisely for non-payment that the claimant was constrained to terminate the contract and on the other hand the claimant is barred from pursuing a speedy claim in adjudication until the final account is finalised and the employer disputes the final account and refers the matter to arbitration.*

[65] That would be to defeat the purpose of CIPAA altogether and it might as well be declared loud and clear that CIPAA is not available to a contractor who terminates the contract even for lawful grounds. If that had been the intention of Parliament on a matter of such serious ramifications, it could easily have added such a provision under s. 3 on 'Non-application'.

[66] It would be dangerous to conclude from silence that Parliament had not intended CIPAA to apply once the contract has been terminated, whether by the contractor or the employer, for then the full and final resolution of all disputes is better resolved at arbitration when the final account is ready. It would be a case where when CIPAA is most needed to solve the contractor's problem of non-payment by the employer that its prophylactic properties are not available until final account is prepared which the employer here admits that it would take a considerable time.

[67] *Whilst there may be issues that may be more fully ventilated and resolved finally in arbitration, the statutory right to adjudication must be promoted and preserved if the purpose of CIPAA to facilitate regular and timely payment and to provide for speedy dispute resolution through adjudication is not to be thwarted*. Adjudication yields a result of interim finality and merely because arbitration or litigation may more fully resolve all disputes arising out of the termination of a construction contract, that is no justification for dismissing adjudication as being wholly inapplicable even when the contractor has a valid payment claim within the meaning of s 5 of the CIPAA. (emphasis added)

[56] Further, we are of the view that the respondent is in a healthy financial position based on the documents shown (see record of appeal (suit 443) vol. 2C (5) pp. 1033 to 1044). Therefore, we do not agree that the respondent will not be able to pay the appellant in the event the latter is successful in the arbitration. In fact, the record shows, among others the respondent generated revenue of RM728 million (see: record of appeal (suit 443) vol. 2C (5) pp. 1033 to 1044). Hence, this is another reason why the adjudication decision should not be stayed.

Conclusion

[57] We could not say the adjudicator had made clear errors in his adjudication decision. We also respectfully do not think the justice of the case merits the adjudication decision to be stayed.

[58] Based on all the reasons that we have highlighted, we are unanimous in dismissing the present appeal. We are of the considered view that the decision of the learned judge at the HC should accordingly be affirmed.